

1 UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF NEVADA

3 In re

4 LAS VEGAS MONORAIL COMPANY,  
5 a Nevada non-profit corporation,

6 Debtor.

Case No.: No. BK-S-10-10464-BAM  
Chapter 11

USDC Case No.: 2:10-cv-00678-JCM-  
LRL

7 AMBAC ASSURANCE CORPORATION; and  
8 THE SEGREGATED ACCOUNT OF AMBAC  
9 ASSURANCE CORPORATION, BY ITS COURT  
10 APPOINTED REHABILITATOR, THE OFFICE  
11 OF THE COMMISSIONER OF INSURANCE  
12 FOR THE STATE OF WISCONSIN,

11 Appellants,

12 v.

13 LAS VEGAS MONORAIL COMPANY, a Nevada  
14 non-profit corporation,

15 Appellees.

**REPLY BRIEF IN SUPPORT OF  
EMERGENCY MOTION FOR STAY  
PENDING APPEAL PURSUANT TO  
FEDERAL RULE OF BANKRUPTCY  
PROCEDURE 8005**

16 Ambac Assurance Corporation and The Segregated Account of Ambac Assurance  
17 Corporation (“**Segregated Account**”) by its court appointed Rehabilitator, the Office of the  
18 Commissioner of Insurance for the State of Wisconsin (the “**Rehabilitator**” and, collectively with  
19 Ambac Assurance Corporation, “**Ambac**”), submit this Reply Brief in Support of their  
20 Emergency Motion for Stay Pending Appeal (the “**Motion**”). In the Motion, Ambac  
21 demonstrated that a stay pending resolution of Ambac’s appeal (“**Appeal**”) of the Bankruptcy  
22 Court’s order denying Ambac’s motion to dismiss (“**Order**”) [A.E.R. 01880-01932] pursuant to  
23 Federal Rule of Bankruptcy Procedure 8005 is warranted under the circumstances because: (1) a  
24 stay will ensure that an important issue of first impression, which the Bankruptcy Court  
25 incorrectly decided and has constitutional implications, receives appellate review; (2) a stay will  
26 not harm the Debtor Las Vegas Monorail Company (“**LVMC**”) or its creditors; and (3) a stay will

1 avoid the irreparable harm to Ambac and other creditors and parties in interest from  
 2 implementing a chapter 11 plan or reorganization<sup>1</sup> that would then have to be unwound if Ambac  
 3 prevails on appeal. As required by Rule 8005, Ambac first demonstrated that it previously made  
 4 this request to the Bankruptcy Court, but that the request for stay was denied. Ambac then  
 5 showed that the Bankruptcy Court abused its discretion in denying the stay since it applied the  
 6 incorrect legal standard (when it concluded that Rule 8005 did not apply) and also by concluding  
 7 that Ambac had not met the four factors considered by courts when deciding whether to stay  
 8 proceedings pending appeal.

9 In Debtor-Appellee's Opposition to Appellants' Emergency Motion for Stay Pending  
 10 Appeal Pursuant to Federal Rule of Bankruptcy Procedure 8005 ("**LVMC Opposition**"), LVMC  
 11 ignores Ambac's arguments about the Bankruptcy Court's abuse of discretion and accuses Ambac  
 12 of not addressing "in any meaningful fashion" the Bankruptcy Court's denial of Ambac's motion  
 13 because it sought, what the Bankruptcy Court characterized as a "comprehensive injunction" of  
 14 the chapter 11 proceedings. LVMC Opposition at 2. LVMC, like the Bankruptcy Court,  
 15 mischaracterizes Ambac's request when it asserts that "Ambac is seeking, by requesting a stay,  
 16 the very relief which it was denied on the merits." LVMC Opposition at 9 (quoting Stay Denial  
 17 Order at 3). Ambac is not asking this Court to dismiss LVMC's petition pending appeal. Rather,  
 18 Ambac is asking the Court to stay the Bankruptcy Court proceedings until the resolution of the  
 19 important issue of whether the Bankruptcy Court can exercise constitutional authority over  
 20 LVMC's chapter 11 petition. Such a stay is available under Rule 8005, which provides in  
 21 pertinent part that "the bankruptcy judge may *suspend* or order the continuation of *other*  
 22 *proceedings in the case under the Code or make any other appropriate order during the pendency*

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23 <sup>1</sup> LVMC has filed several stipulations to extend the exclusivity period for filing a chapter 11 plan of reorganization.  
 24 If LVMC's chapter 11 plan is confirmed in the absence of a stay pending appeal, and the Order is subsequently  
 25 reversed on Appeal, Ambac does not believe that the Appeal will become moot because all of the Bankruptcy Court's  
 26 rulings in the Chapter 11 bankruptcy case will be void on jurisdictional and Constitutional grounds. However,  
 LVMC has taken the position that the Appeal will become moot if the Bankruptcy Court confirms a chapter 11 plan,  
 and the plan becomes substantially consummated. In order to avoid any uncertainty regarding these issues, Ambac  
 believes that it is necessary for this Court to issue a stay pending final adjudication of this Appeal.

1 *of an appeal on such terms as will protect the rights of all parties in interest.*" (Emphasis added).

2 Ambac addressed the Bankruptcy Court's misapplication and misreading of Rule 8005  
3 and its conclusion that Ambac should have commenced an adversary proceeding to seek an  
4 injunction. Motion at 3-4, 7-8. As explained therein, contrary to the Bankruptcy Court's  
5 conclusion, the plain language of Rule 8005 provides courts the avenue to grant exactly the relief  
6 sought by Ambac. Fed. R. Bankr. P. 8005 (giving the Bankruptcy Court the power to suspend the  
7 proceedings or "*make any other appropriate order during the pendency of an appeal on such*  
8 *terms as will protect the rights of all parties in interest*") (emphasis added). LVMC ignores the  
9 language of Rule 8005 in its Opposition.

10 LVMC then argues that even if Rule 8005 applies, Ambac has not met the four factors  
11 considered by courts in granting a stay: 1) appellant's likelihood of success on the merits of the  
12 appeal; (2) whether appellant will suffer irreparable injury absent a stay; (3) whether issuing the  
13 stay will substantially injure the appellee or the defendant; and (4) the public interest. *Adelson v.*  
14 *Smith (In re Smith)*, 397 B.R. 134, 136 (Bankr. D. Nev. 2008). As set forth fully in Ambac's  
15 Motion, and explained below, LVMC is wrong – Ambac meets all four factors. Accordingly, the  
16 Bankruptcy Court abused its discretion in refusing to stay proceedings pending Ambac's Appeal.<sup>2</sup>

17 <sup>2</sup> Although not pertinent to the issues raised on Appeal or this Motion, LVMC mischaracterizes certain facts and  
18 implications regarding the creation of the Segregated Account. Specifically, the allegations in Paragraphs 2-5 of the  
19 LVMC's Response are inaccurate and are directly contradicted by the Wisconsin rehabilitation court proceedings.  
20 First, contrary to LVMC's assertion, the Segregated Account is not capitalized with only a non-marketable \$2 billion  
21 note of questionable value. In fact, all policyholder claims (including claims of the LVM Bondholders) in respect of  
22 policies allocated to the Segregated Account, are supported by direct recourse against essentially all of the assets of  
23 Ambac Assurance Corporation. The Office of the Wisconsin Commissioner of Insurance made express findings to  
24 that effect on March 24, 2010, detailing the adequacy of the capitalization of the Segregated Account. Similarly, the  
25 Wisconsin Circuit Court subsequently made specific Findings of Fact and Conclusions of Law to that effect. Those  
26 Findings and Conclusions are posted on the public website approved by the Wisconsin Circuit Court for giving  
public notice of court filings and decisions. See [www.ambacpolicyholders.com](http://www.ambacpolicyholders.com) posting for the Wisconsin Circuit  
Court's May 27, 2010 "Findings of Fact and Conclusions of Law Regarding Motions of Certain LVM Bondholders"  
at Finding ¶ 26 (first bullet point) and Conclusion ¶ 2. As noted in the Wisconsin Commissioner's May 20, 2010  
brief (see pp. 22-23), the Segregated Account is fully and fairly capitalized by the resources of Ambac, and, as noted  
in that same brief at page 27, "the pool of assets available to pay policyholder claims (via the secured note and  
reinsurance policy from Ambac) is essentially the same as existed prior to the establishment of the Segregated  
Account." See posting on [ambacpolicyholders.com](http://ambacpolicyholders.com); see also Plan of Operation for the Segregated Account attached  
to the Wisconsin Commissioner's 3/24/10 Petition for Rehabilitation in the Wisconsin rehabilitation court. *Id.*

Similarly, LVMC's contentions that (a) the General Account of Ambac is a mere "servicer" or (b) that the

1           **A.      Ambac Has a Likelihood of Success on the Merits of Its Appeal.**

2           In the Motion, Ambac demonstrated that it has a likelihood of success on the merits of its  
3 Appeal. Ambac explained how in the Order the Bankruptcy Court created a legal framework for  
4 analyzing the question of whether LVMC is an instrumentality of the State that has not been used  
5 by any other court and that the Bankruptcy Court ignored or misinterpreted the case law and  
6 statutory guidance with respect to the defining characteristics of a “municipality” or an  
7 “instrumentality of a State” under Section 101(40) of the Bankruptcy Code. Motion at 9-12.

8           Rather than identify any authority that supports the Bankruptcy Court’s Order or  
9 otherwise refute Ambac’s arguments that the Bankruptcy Court erred when it concluded that  
10 LVMC is not an instrumentality of the State of Nevada, LVMC diverts the issue to a discussion  
11 of the standard of review on appeal. LVMC Opposition at 11-12. LVMC, however, is entirely  
12 wrong in its assertion that the standard of review for Ambac’s Appeal is clearly erroneous.  
13 Rather, as shown by the cases cited by LVMC, the standard of review is *de novo*.

14           LVMC asserts that the review of the trial court’s factual findings regarding the “degree of  
15 control” a person exercises over an entity is reviewed under the clearly erroneous standard of  
16 review. LVMC Opposition at 11, citing *Harwood v. FNFS Ltd. (In re Harwood)*, Nos. 6:09-cv-  
17 112 (LEAD) & 6:09-cv-126, 2010 U.S. Dist. LEXIS 30860, at \*5 (E.D. Tex. Mar. 30, 2010).  
18 The Texas court in *Harwood* examined the degree of control exercised by the individual debtor,  
19 Harwood, over a company. *Harwood*, 2010 U.S. Dist. LEXIS 30860, at \*9-\*11. However, once  
20 the court determined the degree of control as a matter of fact, the legal effect of that control (*i.e.*,  
21 whether Harwood owed the company a fiduciary duty) was a legal issue that the court reviewed

22           Wisconsin rehabilitation court’s temporary injunction will preclude the beneficiaries of policies in the Segregated  
23 Account from receiving fair and appropriate consideration on their policy claims pursuant to the Wisconsin  
24 Commissioner’s Plan of Rehabilitation, each lack merit. The Wisconsin Circuit Court’s temporary moratorium on  
25 payments referenced by LVMC is a standard part of the rehabilitation process. Following confirmation of the  
26 Commissioner’s Plan of Rehabilitation, there will be “catch up” payments for any beneficiaries who were adversely  
affected by the temporary moratorium; those payments will be effected from the General Account pursuant to the  
court-approved secured note and reinsurance agreement.

In short, the allegations advanced here by LVMC about the Wisconsin rehabilitation proceeding are  
misguided, materially inaccurate, and have been expressly rejected by the Wisconsin Circuit Court.

1 *de novo*. *Id.* at \*6 (“The question of whether a fiduciary duty exists for purposes of the  
2 bankruptcy code is a matter of federal law and is subject to the *de novo* review by the Court.”).

3 Similarly, in this case, there is no factual dispute about the powers and control that the  
4 State of Nevada has over LVMC. In fact, in determining whether LVMC is an instrumentality of  
5 the State of Nevada, the Bankruptcy Court did not decide any disputed facts, nor does Ambac’s  
6 Appeal challenge any of the Bankruptcy Court’s factual findings. Rather, at issue in Ambac’s  
7 Appeal is the legal effect of that control, *i.e.*, whether that control renders LVMC an  
8 instrumentality of the State of Nevada under the Bankruptcy Code. Thus, as in the *Harwood*  
9 case, that legal conclusion is reviewed *de novo*. *Id.*; *see also In re City of Vallejo*, 408 B.R. 280,  
10 288-89 (9th Cir. B.A.P. 2009) (case cited by LVMC, recognizing that the appellate court reviews  
11 the bankruptcy court’s conclusions of law *de novo*).

12 It appears that the only argument that LVMC could make to challenge Ambac’s showing  
13 regarding its likelihood of success on the merits of its Appeal is to incorrectly identify the  
14 standard of review. For the reasons set forth in the Motion, Ambac has demonstrated that it is  
15 likely to succeed on the merits of the Appeal, which LVMC has been unable to refute in any  
16 meaningful way.

17 **B. Ambac Will Suffer Irreparable Harm Absent a Stay Pending Appeal.**

18 In its Motion, Ambac showed that if the chapter 11 reorganization continues while the  
19 Appeal is pending, Ambac and other interested parties are likely to incur irreparable injury, either  
20 because the Appeal will be rendered moot by the substantial consummation of the plan (as LVMC  
21 contends), or because all of the reorganization efforts in the chapter 11 case will have to be  
22 unwound (as Ambac contends). As Ambac explained, unwinding the reorganization may  
23 unavoidably lead to unknown and unknowable harm being inflicted upon innocent creditors,  
24 vendors and other parties in interest – all of which would be avoided only if the District Court  
25 stays the chapter 11 bankruptcy proceedings pending resolution of Ambac’s Appeal. Motion at  
26 12-14.

1 In response, LVMC makes clear that it will continue to move forward with its  
 2 reorganization in the absence of a stay pending appeal and contends that doing so may moot the  
 3 Appeal, notwithstanding the need for an appellate court to adjudicate important statutory  
 4 interpretation and Tenth Amendment issues raised by Ambac's Appeal. *See* LVMC Opposition  
 5 at 13. LVMC further argues Ambac will not be injured or that any injury to Ambac has a legal  
 6 remedy. LVMC Opposition at 13-14. However, LVMC does not explain how Ambac could be  
 7 compensated for the harm to it caused by proceeding with a reorganization, incurring all the costs  
 8 associated therewith, and facing the practical difficulty of unwinding the transactions  
 9 implemented as part of a reorganization – or put simply, LVMC does not explain how Ambac or  
 10 any other creditor will be able to unscramble the egg. Because Ambac and other creditors face  
 11 harm that could be avoided by staying the chapter 11 proceedings pending resolution of Ambac's  
 12 Appeal, the District Court should stay the chapter 11 bankruptcy case until Ambac's Appeal is  
 13 resolved.

14 **C. LVMC Will Not Be Harmed by a Stay.**

15 In its Motion, Ambac explained that LVMC continues to operate during reorganization  
 16 and, as such, LVMC will not face any harm from a stay. Motion at 14-16. LVMC makes two  
 17 responses: (1) that a stay will harm it since it will have the uncertainty of the bankruptcy  
 18 proceeding hanging over its operations (LVMC Opposition at 15-16); and (2) that Ambac should  
 19 post a bond in the event of a stay (LVMC Opposition at 9-10). First, LVMC is currently  
 20 operating with the uncertainty of the bankruptcy proceedings hanging over its operations. The  
 21 stay would preserve the status quo by keeping LVMC in the same state with no further harm to  
 22 LVMC. More importantly, the District Court's issuance of a stay pending appeal will remove the  
 23 additional uncertainty hanging over LVMC about whether its chapter 11 reorganization will have  
 24 to be completely unwound in the event that the Order is reversed on Appeal. If the chapter 11  
 25 case is stayed while the appellate courts review whether the Bankruptcy Court has jurisdiction to  
 26 effect the chapter 11 reorganization, one part of the cloud of uncertainty that LVMC is claiming



1 exists will be removed, which would benefit (not harm) LVMC and other creditors.

2 In addition, LVMC makes the puzzling accusation that Ambac's Motion "makes no  
3 mention of a bond." LVMC Opposition at 9-10. To the contrary, Ambac addressed the issue of  
4 an appeal bond on pages 15-16 of its Motion. As explained therein, the Court should not require  
5 Ambac to post a bond because LVMC will not be harmed by a stay pending appeal. However, if  
6 this Court determines that a bond is required, Ambac submits that the amount of the bond should  
7 be minimal given that LVMC is operating cash flow positive in the chapter 11 case.

8 **D. A Stay Advances the Public Interest.**

9 Finally, in Ambac's motion, Ambac showed that a stay advances the public interest  
10 because "[t]here is a great public interest in the efficient administration of the bankruptcy  
11 system." *Adelson*, 397 B.R. at 148. LVMC's only response is that the Bankruptcy Court  
12 concluded a stay was not in the public interest and that Ambac did not show that conclusion was  
13 an abuse of discretion. LVMC Opposition at 16. However, LVMC does not dispute, because it  
14 cannot, that a stay of the proceedings pending resolution of Ambac's Appeal of the Order will  
15 conserve the resources and time of the Bankruptcy Court, LVMC and its creditors. Furthermore,  
16 the public interest is served by ensuring that an important, constitutional issue of first impression  
17 in the Ninth Circuit is afforded appellate review. Ensuring that important issues are properly  
18 reviewed maintains and instills confidence in the judicial system, thereby advancing the public  
19 interest.

20 **VII. CONCLUSION**

21 For the reasons set forth herein and in Ambac's Motion, Ambac respectfully requests that  
22 this Court grant Ambac's request for a stay pending appeal.  
23  
24  
25  
26

1 Dated: July 15, 2010

Respectfully submitted,

2 MCDERMOTT WILL & EMERY LLP

3 William P. Smith (IL Bar No. 6187205)

4 Steven S. Scholes (IL Bar No. 6191220)

5 James W. Kapp III (IL Bar No. 6239269)

6 Amy G. Doebling (IL Bar No. 6272148)

7 FENNEMORE CRAIG, P.C.

8 By: /s/ Craig S. Dunlap

9 Laurel E. Davis

10 Craig S. Dunlap

11 Jeffrey S. Steffen

12 *Attorneys for Ambac Assurance Corporation*  
13 *and The Segregated Account of Ambac*  
14 *Assurance Corporation, by its Court Appointed*  
15 *Rehabilitator, the Office of the Commissioner*  
16 *of Insurance for the State of Wisconsin*